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Supreme Court, U.S.
FILED
APR 3 - 2006
OFFICE OF THE CLERK

No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,
Petitioners

v.

WILLIAM TWOMBLY, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MASTERCARD INTERNATIONAL INC. AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

MasterCard International Inc. ("MasterCard") and Visa U.S.A. Inc. ("Visa") are joint ventures established and operated by various financial institutions to develop and promote globally recognized payment cards. Neither MasterCard nor Visa actually issues payment cards to consumers; various member banks issue cards. Instead, MasterCard and Visa provide certain services that would be difficult for their individual members to perform on their own, including: (1) the promotion and marketing of a universally recognized mark; and (2) a system to facilitate the approval and processing of charges involving millions of merchants and card-holders and thousands of banks every day. The result has been expanded output, declining prices, and technological innovation—all indicators of significant and increasing competition.

In MasterCard's and Visa's view, "[n]o analytical exercise is more important to U.S. competition policy than defining the bounds of acceptable cooperation between direct rivals." *In re Polygram Holding, Inc.*, No. 9298, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) (Opinion of Chairman Timothy J. Muris). Because they are joint ventures of banks across the country, MasterCard and Visa are sometimes subjected to allegations of conspiracy based simply on their structure. Of course, the formation of *bona fide* joint ventures among competitors is entirely lawful. *See, e.g., Texaco, Inc. v. Dagher*, 126 S. Ct. 1276, 1279-80 (2006). But that has not stopped plaintiffs' lawyers from alleging that the payment card industry's very nature is somehow suspect under the federal antitrust laws. *See, e.g., Nat'l Bancard Corp. v. Visa U.S.A. Inc.*, 779 F.2d 592, 596 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); *Reyn's Pasta Bella,*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or part, and no person or entity other than *amici* and their counsel made a monetary contribution to its preparation or submission.

LLC v. Visa U.S.A. Inc., 259 F. Supp. 2d 992, 1004 (N.D. Cal. 2003), *aff'd*, -- F.3d --, 2006 WL 760175 (9th Cir. Mar. 27, 2006); *Kendall v. Visa U.S.A. Inc.*, No. C 04-04276JSW, 2005 WL 2216941, at *1 (N.D. Cal. July 25, 2005).

In addition, as two of the four major "brands" of payment cards in the United States (the others are American Express and Discover), MasterCard and Visa have a special interest in ensuring that business entities are not subjected to burdensome litigation based on nothing more than a lawyer's ability to assert that vigorous competitors have at times acted in ways that can be characterized as "parallel." In fact, the history of the various payment card networks illustrates that parallelism is often a sound, pro-consumer business strategy.

Perhaps the most obvious example of parallelism involves the physical cards themselves. All payment cards are the same general size and shape, which makes it possible both for the cards to be carried in a purse or wallet along with a driver's license and other identification and allows the same machines to read the different networks' cards. Payment card companies have also engaged in parallelism involving technology. For example, payment card companies have made rational and independent—yet parallel—business decisions with regard to the feasibility of implementing particular technological innovations. Although each of these examples of parallelism was entirely lawful, it is precisely these sorts of sensible business decisions that will surely be subjected to increased scrutiny and litigation absent this Court's prompt intervention.

REASONS FOR GRANTING THE WRIT

Petitioners have cogently explained how the Second Circuit's decision conflicts with both the decisions of this Court and those of its sister Circuits, Pet. for Cert. 11-21, why it "invites frivolous litigation," *id.* at 26-29, and why prompt review by this Court is both necessary and appropriate, *id.* at

28-29. *Amici* will not repeat that analysis here. Instead, we will focus on two practical ramifications of the Second Circuit's decision, each of which independently warrants certiorari. *First*, ensuring that Rule 8(a)'s admittedly modest pleading requirements are not drained of all rigor is especially important for antitrust cases brought in the name of consumers, in which the nature of the disputes, the massive and asymmetrical discovery costs, and the threat of crippling remedies often combine to pressure defendants to settle cases that survive a motion to dismiss, even when the plaintiff's claims are marginal at best. Accordingly, it is critically important in such cases that the pleading stage afford antitrust defendants a meaningful opportunity to end a meritless suit before the risk calculus shifts and discovery commences. *Second*, as a mere six months' experience already shows, *Twombly* is a highly significant decision whose effects are already being felt far beyond the telecommunications industry or even antitrust cases.

I. Meaningful implementation of the Rule 8(a) pleading standard is especially important in antitrust cases.

As courts and commentators have long recognized, far from proving anticompetitive collusion, consciously parallel business conduct is often a hallmark of an efficient market.[2] Firms operating in the same industry confront similar cost and incentive structures, and it is hardly surprising that sophisticated businesses pay close attention to their rivals, both

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[2] *See, e.g.*, James L. Smith, *Distinguishable Patterns of Competition, Collusion, and Parallel Action* 23 (May 5, 2003), *available at* http://web.mit.edu/ceepr/www/2003-006.pdf (last visited April 5, 2006) ("[T]he degree of parallel action among producers varies predictably with the degree of interdependence among firms . . . . [M]easures of parallel action are expected to vary inversely with the degree of interdependence: more parallelism among perfectly competitive firms, less among interdependent oligopolists, and even less among collusive members of a frictionless cartel.").

to ensure that they have not overlooked a revenue-increasing or cost-saving opportunity and to avoid being placed at a competitive disadvantage with respect to their mutual customers. Accordingly, legal rules that subject businesses to substantial costs simply because they have engaged in conduct that can be characterized as "parallel" risk deterring a great deal of pro-competitive behavior, generating net social losses that consumers will ultimately bear.

The pleading standard announced in *Twombly* is just such a rule. Because plaintiffs' lawyers will surely seize (and have already seized) upon it to argue that antitrust conspiracy claims can survive initial review based on factual allegations that demonstrate nothing more than parallel conduct, *Twombly* will harm competition for at least three important reasons.

The first relates to the nature of antitrust discovery. As this Court no doubt knows, civil discovery tends to be costly and time-consuming.[3] But this general reality is especially true for antitrust actions, where the inevitably fact-intensive and complex nature of the claims coalesce to make discovery particularly onerous, lengthy, and expensive.[4] As a result, antitrust cases tend to last substantially longer (and thus consume substantially more resources) than other types of civil litigation.[5] These basic realities give any rational business a

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[3] *See, e.g.*, Report from the Advisory Comm. on Fed. R. Civ. P. to the Standing Comm. on R. of Prac. & P. 7-8 (Dec. 15, 2005), *available at* http://www.uscourts.gov/rules/Reports/CV12-2005.pdf (last visited April 5, 2006).

[4] *See, e.g.*, *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 805 (D.D.C. 1977) ("The discovery rules should normally be liberally construed . . . in antitrust cases.").

[5] Of the 599 antitrust cases of which the federal courts disposed in fiscal year 2000, the most recent year for which searchable data is readily available, the mean period from filing to final disposition was slightly more than 405 days. During the same year, the mean for all cases was approximately 312 days, about 23% or *three months shorter*. For cases

powerful incentive to avoid even factually meritless antitrust suits, even if that means forgoing certain competition-enhancing conduct in which the firm would otherwise engage.

Second, the fact that discovery costs in antitrust cases tend to be highly asymmetrical only exacerbates this general problem. Antitrust plaintiffs are generally much smaller than antitrust defendants, meaning that plaintiffs can demand both types and amounts of information that dwarf anything their adversaries could possibly seek in return. *See* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 643 (1989) ("Large litigants have files—warehouses full of files. The adversary can demand that they be searched, at great cost; the adversary can notice the depositions of 20 corporate officers."); *see also* William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898 (2003) ("[T]he strategic plaintiff will evaluate her own exposure to costly discovery requests before drafting a broad discovery request."). In addition, because they have the power to choose when and on what precise theory to bring suit, antitrust plaintiffs can "structure [their] complaint to minimize the relevance of documents in [their] possession," which gives them a "tactical advantage in defining the parties' exposure to discovery costs." Wagener, *supra* at 1899. These general imbalances are even more pronounced when antitrust class actions are brought in the name of consumers, situations

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terminated during fiscal year 1999, the comparable figures were slightly more than 497 and 406 days, respectively. (All data in this footnote was obtained from the searchable Federal District-Court Civil Cases database, available at http://teddy.law.cornell.edu:8090/questcv3.htm.) Significantly, this database does not distinguish between cases terminated at the pleading stage and those disposed of after discovery—for example, at the summary judgment stage. Therefore, it is likely that the lifespan of cases which survive past the pleading stage until summary judgment is significantly longer.

in which the plaintiffs' discovery costs will almost certainly be negligible, the defendants' will almost certainly be substantial, and the likelihood of bringing counterclaims is meager. The fact that antitrust discovery will almost always be far more expensive for defendants than plaintiffs, in turn, means that the former have far more powerful incentives to avoid it than the latter.

A final reason why permitting antitrust actions that are facially marginal to survive the pleading stage risks deterring pro-consumer conduct involves the prospect of what may happen if such a case ever reaches trial.[6] Because the upside of an antitrust plaintiff's victory is so huge—mandatory treble damages and fee-shifting—plaintiffs' attorneys have every incentive to press even marginal claims to the bitter end. *See, e.g.*, Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 Tul. L. Rev. 777, 809 (1987) ("The lure of treble damages may encourage the filing of baseless suits which otherwise might not have been filed."). At the same time, because trials are so expensive and because even a small risk of potentially crippling liability is something that any sensible business will seek to

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[6] *Twombly* does not purport to undermine the burden a Section 1 plaintiff must carry at the summary judgment stage. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (to survive summary judgment in the absence of direct evidence of conspiracy, a plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently") (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). That said, by threatening to extend the life of meritless cases, *Twombly* risks allowing many plaintiffs whose claims would otherwise be dismissed at the pleading stage a chance to survive the summary judgment hurdle as well, particularly given the fact that lower courts have sometimes allowed antitrust plaintiffs to reach trial based on little more than isolated, ambiguous, or confusing documents. Moreover, even when a defendant does prevail at the summary judgment stage, such a victory cannot restore the time and money wasted in defending against a strike suit. In short, although it is an important gatekeeper, summary judgment is no panacea for the problems created by *Twombly*.

avoid, it will often be rational for antitrust defendants to settle actions that they are confident would be proven meritless at a trial. *See, e.g.*, Edward D. Cavanagh, *Pleading Rules in Antitrust Cases: A Return to Fact Pleading?*, 21 Rev. Litig. 1, 11-13 (2002) ("Using straightforward cost-benefit analysis, many defendants faced with potentially huge outlays necessary to defend an action would choose to settle antitrust claims that they view as insubstantial and lacking in merit rather than to make the huge expenditures necessary to prevail at trial.").

The upshot of these facts and incentives is clear. Antitrust litigation is tremendously expensive, and it is generally far more so for defendants than for plaintiffs. Especially when combined with the widely asymmetrical risks the litigants will face if a case ever goes to trial, this basic reality encourages enterprising plaintiffs' attorneys to bring marginal claims without sufficient pre-filing factual investigation and makes it far easier for them to extract more and higher settlements from corporate defendants than the merits of their cases would otherwise warrant. A motion to dismiss for failure to state a claim should provide a defendant with a meaningful opportunity to end the proceeding before the risk calculus shifts and years of costly discovery commence. Accordingly, *Twombly*'s conclusion that Rule 8(a) erects only the thinnest of paper barriers against even facially frivolous claims threatens to induce firms to forgo efficient, procompetitive behavior to minimize the risk of such suits being filed in the first place, or to avoid the burdens of antitrust litigation by settling meritless claims for sums that will inevitably be paid by consumers.

II. Lower courts and plaintiffs' lawyers have already seized on *Twombly* to justify loosening existing pleading standards in a wide variety of contexts.

Although it is the context in which this particular case arose, the pernicious impacts of the Second Circuit's decision will not be confined to the telecommunications industry. Rather, courts in both the Second Circuit and elsewhere are already interpreting *Twombly* as an important general pronouncement about the Rule 8(a) pleading standard.

An examination of the subsequent cases that have referenced *Twombly* confirms its importance. Not surprisingly, *Twombly* has had an immediate and significant effect on district courts' understanding of the pleading standards for antitrust claims brought under Section 1 of the Sherman Act. In *Arnold Chevrolet LLC v. Tribune Co.*, a judge of the Eastern District of New York applied *Twombly*'s "realm of plausible possibilities" test to refuse to dismiss a complaint where "one possible *interpretation*" of the plaintiffs' allegations might lead to a finding of an unlawful conspiracy. No. 04-CV-3097 (DRH) (WDW), 2006 WL 497202, at *6 (E.D.N.Y. Mar. 2, 2006) (emphasis added). Courts outside the Second Circuit have also relied on *Twombly*'s description of the proper pleading standard to justify permitting antitrust conspiracy claims to survive motions to dismiss, and thus to compel defendants to submit to costly and time-consuming discovery. *See, e.g., In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 460-61 (E.D. Pa. 2005); *In re Urethane Antitrust Litig.*, 409 F. Supp. 2d 1275, 1282, 1284 n.4 (D. Kan. 2006).

Nor has *Twombly*'s impact been limited to antitrust cases. For example, Judge Gerard E. Lynch, the district court judge whose careful opinion the Second Circuit reversed in *Twombly*, later applied the Second Circuit's formulation of the notice pleading standards to the securities fraud context in holding that the plaintiffs had adequately pled "control."

See In re Global Crossing, Ltd. Sec. Litig., No. 02 Civ. 910 (GEL), 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005). A different judge in the Southern District of New York later relied upon Judge Lynch's interpretation of the Second Circuit's *Twombly* decision to deny a motion to dismiss a securities fraud claim against two executives based on "control" allegations that were even more tenuous than those at issue in *Global Crossing*. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 503 (S.D.N.Y. 2005). In so holding, Judge Victor Marrero made clear that he would have dismissed the relevant claim pre-*Twombly* but that he had been persuaded that *Twombly* had altered the analysis. *See id.* District courts have also cited *Twombly* as justification for failing to dismiss actions for copyright infringement,[7] for employment discrimination,[8] and in other employment-related litigation.[9]

Plaintiffs' lawyers too have seized on *Twombly* to argue that their pleading burden is virtually nonexistent. Only weeks after the decision was handed down, plaintiffs in one antitrust case were arguing that *Twombly* "trumps" existing Second Circuit authority that had sensibly recognized that "'drawn-out proceedings necessary to evaluate [antitrust claims] could chill competitive forces.'"[10] According to that same filing, *Twombly* "expressly quoted and adopted" a "*special rule* for preserving antitrust cases for the discovery stage," and "explained that at the pleading stage even a po-

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[7] *See Michael Aram, Inc. v. Laurey*, No. 05 Civ. 8380 (CSH), 2006 WL 510527, at *3 (S.D.N.Y. Mar. 1, 2006).

[8] *See Waterman v. Register.com*, No. 05 CIV 2191 (GEL), 2005 WL 2759825, at *2 (S.D.N.Y. Oct. 19, 2005).

[9] *See Lee v. Healthfirst, Inc.*, No. 04 Civ. 8787 (THK), 2006 WL 177175, at *5 (S.D.N.Y. Jan. 25, 2006).

[10] Pls.' Mem. in Opp. to Mot. to Dismiss by Defs. New York Univ. and Dr. Andrew Litt at 6, *New York Medscan LLC v. Carecore Nat'l LLC*, No. 05 Civ.4653 (DC) (S.D.N.Y. Nov. 18, 2005), 2005 WL 3654139 (quoting *Balaklaw v. Lovell*, 14 F.3d 793, 801 (2d Cir. 1994)).

tentially remote recovery is not subject to dismissal."[11] Numerous other plaintiffs have swiftly incorporated *Twombly* into their filings.[12]

A further, though not statistically rigorous, indication of *Twombly*'s immediate impact can be seen in the number of times courts have already cited the Second Circuit's opinion. During the week it decided *Twombly*, the Second Circuit issued eight published opinions.[13] *Twombly* is the most cited of these opinions by far, having been referenced by courts more than twice as often as the next most frequently cited opinion and five times more often than any of the others.[14]

In short, *Twombly* is far from simply yet another decision that applies existing Rule 8 pleading standards. Rather, it is an important ruling whose evisceration of well-established pleading requirements has already started to expand far beyond its original context and seems certain to continue doing

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[11] *See id.* at 5 (emphasis added).

[12] *See, e.g.*, Mem. of Law in Opp. to Xerox Defs.' Partial Mot. to Dismiss the Am. Compl. at 26, *Carlson v. Xerox Corp.*, No. 3:00-CV-1621 (D. Conn. Jan. 31, 2006), 2006 WL 372098; Class Pls.' Mem. in Opp. to Defs.' Joint Mot. to Dismiss Claims Alleged to be Outside the Statute of Limitations in Class Pls.' Second Am. Consol. Class Action Compl., *In re Publ'n Paper Antitrust Litig* at 3-4, No. 3:04 md 1631 (SRU) (D. Conn. Nov. 30, 2005), 2005 WL 3726244. A Westlaw Keycite search performed on April 4, 2006 revealed 59 trial-court filings referencing *Twombly*. Because that database includes only a small fraction of all filings, the true number is certainly far larger.

[13] In addition to *Twombly*, the cases are *United States v. Martin*, 426 F.3d 83 (2d Cir. 2005); *United States v. Santos*, 425 F.3d 86 (2d Cir. 2005); *Nokia Corp. v. Uzan*, 425 F.3d 1005 (2d Cir. 2005); *United States v. Valdez*, 426 F.3d 178 (2d Cir. 2005); *United States v. Broadcast Music, Inc.*, 426 F.3d 91 (2d Cir. 2005); *Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005); and *Daniel v. American Board of Emergency Medicine*, 428 F.3d 408 (2d Cir. 2005).

[14] All citation data in this paragraph was obtained through a Westlaw Keycite search conducted on April 4, 2006.

so unless it is promptly disavowed. Because the Second Circuit has refused to do so, *see* Pet. for Cert. App. 59a, this Court's intervention is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 6, 2006